80-1800 No.

Office-Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS, CLERK

In The

Supreme Court of the United States

October Term, 1980

TINO FIUMARA, THOMAS BUZZANCA, and MICHAEL COPPOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Title IX of the Organized Crime Control Act of 1970 (18 U.S.C. §§1961-1963) authorizes the prosecution of individuals for engaging together in a series of alleged criminal acts unrelated in any way to any legitimate business organization, as a so-called "RICO" (Racketeer Influenced and Corrupt Organizations Act) violation? (*See United States v. Turkette*, 632 F. 2d 896, *cert. granted*, 49 U.S.L.W. 3525.)

2. Whether the Government's use of "RICO" in the case at bar exceeded its statutory scope and purpose?

3. Whether petitioners were denied a fair trial by the failure of the court, at *nisi prius*, to have granted a severance?

4. Whether the conjoining of so many defendants into a single "RICO" and single conspiracy to violate "RICO" charge, necessarily created an unfair and prejudicial spillover which precluded a fair trial to the petitioners?

5. Whether this Court should, once and for all, resolve the issue left unsettled in *United States v. White*, 401 U.S. 745, as to whether court orders are required for electronic surveillance where only one party to such surveillance has knowledge thereof and consents thereto?

6. Whether there was proper minimization of the electronic surveillance?

7. Whether the indictment should have been dismissed because "RICO" and "RICO conspiracy" do not apply to "criminal venture" types of enterprises, and the joining of these counts violated Rule 8(b) of the Federal Rules of Criminal Procedure?

8. Whether there were multiple, rather than a single conspiracy, proved in the trial of the indictment, thus rendering the convictions defective?

PARTIES

The parties in the United States Court of Appeals for the Second Circuit were the petitioners herein, the respondent, and the following defendants-appellants: Michael Clemente, Vincent Colucci, Carol Gardner, and Gerald Swanton.

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II. A dichotomy of holdings among the circuits warrants a granting of certiorari since there is no uniform interpretation of the "RICO" statutes among the circuits. 8

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OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided February 26, 1981, is annexed hereto as an appendix.

JURISDICTION

a) The judgment of conviction was rendered the 20th day of June 1980, convicting each of the petitioners of the crime of conspiracy to violate the so-called "RICO" statute [18 U.S.C. §§1962(c) and (d)].

In addition, petitioners Buzzanca and Fiumara were also convicted of violating the "RICO" statute itself [18 U.S.C. §1962(c)], as well as all of the other counts of the indictment of which they were accused. These other counts comprised alleged monthly payments made by Montella on behalf of certain corporations to obtain or retain waterfront business. Each of these counts, however, while dealing with only one payment, charges that the payment was received illegally, both because it was the result of an allegedly extortionate demand and because it was an illegal labor payment. Thus, each payment is charged as two separate violations, namely extortion count and labor payment count.

Additionally, petitioner Fiumara was convicted of tax counts, namely filing false returns and omission to report certain payments allegedly made to him in his income tax return (Counts 157 and 158).

b) The order and judgment of affirmance of the United States Court of Appeals is dated the 26th day of February 1981. An opinion accompanying that order is annexed hereto as an appendix.

c) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Due Process Clause, Fifth Amendment, United States Constitution.

The statutes involved are 18 U.S.C. §§1961(4); 1962(a); 1962(b); 1962(c); 1962(d).

STATEMENT OF THE CASE

Petitioners Thomas Buzzanca, Tino Fiumara and Michael Coppola were tried jointly with Michael Clemente, Vincent Colucci, Carol Gardner and Gerald Swanton before Honorable

Leonard Sand, and a jury, in the United States District Court for the Southern District of New York, following which trial each of the petitioners were convicted of conspiracy to violate the so-called "RICO" statute [18 U.S.C. §1962(c)], and petitioners Buzzanca and Fiumara were convicted of a substantive "RICO" violation [18 U.S.C. §1962(d)], as well as all of the other counts in the indictment with which they were charged.

The petitioner Thomas Buzzanca was sentenced to imprisonment for a period of 10 years and a fine of $5,000 on Count 1, the "RICO" count; 10 years on Count 2, the conspiracy count, concurrently with Count 1; 10 years on each of Counts 14 through 48 inclusive, to run concurrently with each other and to run concurrently with Count 1; 3 months on each of Counts 49 through 84 inclusive, to run consecutively with each other, but to run concurrently with Count 1; and, in addition, was ordered to forfeit to the United States his position as President of an International Longshoremen's Association Union.

Michael Copolla, who was only convicted of the conspiracy count, was sentenced to a term of 13 years imprisonment to run concurrently with a sentence which he was presently serving from the United States District Court, District of New Jersey, but the sentence herein was retroactive to the date that he began the New Jersey sentence.

Petitioner Tino Fiumara was sentenced to 20 years imprisonment on Count 1, to run concurrently with the sentence which Fiumara was presently serving from a conviction in the United States District Court for the District of New Jersey; sentenced to 5 years and a fine of $10,000 on Count 2, to run consecutively to Count 1 of the indictment; 20 years imprisonment on each of Counts 14 through 48 inclusive, to run concurrently with each other and concurrently with Count 1; 6 months on each of Counts 49 through 83 inclusive, to run consecutively with each other, but concurrently with Count 1; 2½ years on each of Counts 210 and 211, to run consecutively with each other and consecutively to the sentence the petitioner

is presently serving, but concurrently with Count 2. All sentences were deemed to have commenced with the service of the New Jersey sentences.

The indictment herein contains 157 counts, involving seven defendants who went to trial. They are numbered 1 through 160, numbers 7, 12 and 86 having been omitted. Each count, of course, charged a separate offense and crime and the jury was required to consider each separately, according to the charge of the Trial Judge.

Count 1 of the indictment charged six of the defendants, Swanton being omitted, with violating the so-called "RICO" statute, by allegedly operating an enterprise designed to control waterfront business in the Port of New York and elsewhere through a "pattern" of racketeering activity.

Count 2 charged the same six defendants with a conspiracy to violate that "RICO" statute.

Counts 3 through 142 each named one or more of these same six defendants, who were named in Counts 1 and 2, with various crimes. The seventh defendant, Gerald Swanton, was named as an aider and abettor in some of these counts, specifically Counts 87 through 142.

A good deal of the facts adduced at trial were highly prejudicial to the petitioners herein and yet they should not have been admitted against the petitioners because they had nothing to do with them.

Since Buzzanca got no money, the position of the petitioner Buzzanca is that there was no violation of the Landrum-Griffin Act.

Ironically, despite the fact that the Government maintained that Buzzanca and Clemente were very close and friendly, in the October 19, 1978 conversation which Buzzanca had with Montella, the latter tells Buzzanca to call Mike Clemente when George gets into town. But the conversation reveals that

Buzzanca doesn't even know where to telephone Mike Clemente and has to get the telephone number from Montella. Buzzanca doesn't even know that it's the Shelton Health Club, and Montella has to tell Buzzanca to ask for Mike C.

With respect to Fiumara, only Montella is the alleged victim. Fiumara is accused of having aided and abetted Thomas Buzzanca between January 1976 and December 1978 in the receipt of money. But Montella never was in fear! Thus, how could there be any extortion?

REASONS FOR GRANTING THE WRIT[1]

I.

THE ACTIVITIES ALLEGED HEREIN WERE NOT IN RELATION TO A LEGITIMATE BUSINESS BUT, RATHER, CENTERED AROUND SUPPOSED ILLEGAL ACTIVITIES OF THE CO-CONSPIRATORS, AND THUS, THERE IS NO ALLEGATION THAT A "LEGITIMATE BUSINESS ENTERPRISE" WAS THE SUBJECT MATTER OF THE "RICO" CONSPIRACY OR SUBSTANTIVE "RICO" VIOLATION.

In essence the indictment charges that the various defendants, including the petitioners herein (with the exception of Swanton), were associated with an "enterprise" as defined in 18 U.S.C. §1961(4). That section defines "enterprise" as including any individual, partnership, corporation, association, *or other legal entity*, "and any union or group of individuals associated in fact although not a legal entity".

18 U.S.C. §1962(c) makes it unlawful "for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to

---

1. We ask this Court to review all the briefs submitted to the court below because we believe they are very relevant and space precludes incorporating them all in this petiton.

conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1961(4) defines "enterprise".

Petitioners maintain that the "RICO" Act was intended to protect "legitimate business enterprises from being preyed upon and taken over by racketeers." Petitioners maintain further that "RICO" does not apply to individuals whose only enterprise activity is allegedly completely criminal.

Viewed in its entirety, "RICO" is a combination of criminal sanctions and civil remedies designed to protect legitimate commercial enterprises from the onslaught of racketeers and provides a means of repairing the effects of such incursions. [*See United States v. Turkette*, 632 F. 2d 896, 898, 899 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3525.]

See also, United States v. Anderson, 626 F. 2d 1358 (8th Cir. 1980).

As the *Turkette* court observed (632 F. 2d at 899, 900):

> "Our interpretation of 'enterprise' to mean only a legitimate enterprise is reinforced by the legislative history of RICO. More than a decade ago, Congress decided that organized crime posed such a grave threat to society that only new, more stringent legislation could ameliorate the situation. . . .
>
> The purpose of RICO was the 'elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.' "

The opinion in *United States v. Turkette* further aptly observed that Congress had no difficulty in drafting legislation specifically outlawing certain activities and that there was no

reason to believe that in drafting the "RICO" statute it said one thing but meant something more. Thus, the opinion continues:

> "A comparison of RICO's legislative history with that of 18 U.S.C. §1955, outlawing illegal gambling businesses, shows that Congress knew how to draft legislation which would make the operation of an illegitimate enterprise a federal offense."

We maintain that the congressional intent demonstrates that while Congress wanted to eliminate organized crime, "RICO" is only one arm of a broad-based attack. It is intended solely to accomplish the distinct purpose of "dislodging the forces of organized crime from legitimate fields of endeavor." (S. Rep. No. 91-617, p. 79).

The *Turkette* court aptly observes:

> "This analysis comports with that of RICO's sponsor, Senator McClellan. 'Title IX is aimed at removing organized crime from our legitimate organizations.' McClellan, *The Organized Crime Control Act*, 46 Notre Dame Law, 55, 141 (1970).
>
> This background casts grave doubts on the government's simplistic and literal interpretation of 18 U.S.C. §1961(1) and 1962(c). Under the government's interpretation, the concept of 'enterprise' is entirely eliminated from this section of the statute. If we follow the government's rationale; one or more individuals can be prosecuted under 1962(c) for engaging in a 'pattern of racketeering activity' which affects interstate commerce. 'Pattern of racketeering activity' is defined as
>
> > at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

> occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

18 U.S.C. §1961(5). Racketeering activity covers a multitude of state and federal crimes. 18 U.S.C. §1961(1). This means, if we accept the government's logic, that one individual who commits two of the crimes defined in 1961(1) within a ten-year period can be prosecuted for violating RICO as well as for the substantive crimes themselves. Although it is an extreme example, there could be a RICO prosecution against a prostitute for two acts of solicitation within the ten year period, if she travels interstate in plying her trade. The individual by commission of the predicate substantive crimes, becomes a 'enterprise'." (632 F. 2d at 903).

II.

A DICHOTOMY OF HOLDINGS AMONG THE CIRCUITS WARRANTS A GRANTING OF CERTIORARI SINCE THERE IS NO UNIFORM INTERPRETATION OF THE "RICO" STATUTES AMONG THE CIRCUITS.

A fundamental basis for the granting of certiorari has traditionally been recognized to be in a situation presented by the case at bar where the circuit courts are in disagreement.

The petitioners herein are convicted for conducting an enterprise whose means are criminal rather than legitimate. Under the circumstances, it is obvious that several circuits have disagreed among themselves as to what the law is with respect to the interpretation of "RICO" statutes when they involved "illegitimate enterprises". *See United States v. Altese,* 542 F. 2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1037 (1977); *United States v. Sutton,* 605 F. 2d 260 (6 Cir. 1979), reversed in banc in *United States v. Sutton,* Nos. 78-5134-39, 78-5141-43 (6 Cir. December 3, 1980).

The First and Eighth Circuits, however, have adopted a *contrary view* [*see United States v. Turkette, supra,* and *United States v. Anderson, supra. See also, United States v. Decidue,* 603 F. 2d 535 (5 Cir. 1979), *cert. denied,* 445 U.S. 946 (1980)].

We also, of course, are well aware of the fact that this Court has granted certiorari in *United States v. Turkette, supra.*

While this Court, at the time this brief is being written, has not yet addressed itself to these issues directly, we submit that our construction of the statute is not aberrational. Interpreting the gambling provisions of the Organized Crime Control Act of 1970, the Supreme Court noted that Title IX ("RICO") "seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity." *Iannelli v. United States,* 420 U.S. 770, 787 n. 19, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975).

The Second Circuit, in *United States v. Altese, supra,* based its holding on two counts: *First,* the statute uses the word "any" in referring to "enterprise" (542 F. 2d at 106). *Second,* Congress manifested an intent to have the "RICO" statute construed liberally, and a restrictive reading of enterprise would leave an unintended "loophole for illegitimate business to escape [the statute's] coverage" (542 F. 2d at 106-107). Both of these arguments are met head on, and refuted, by the opinions in *Turkette* and *Anderson, supra.*

Turkette and *Anderson* demonstrate that *Altese*'s emphasis on Congress' use of the word "any" mistakes the beginning of statutory analysis for its conclusion. Of course, the "RICO" statute, says *Altese,* "must be read to cover '*any enterprise*' ". But what does that mean?

The flaw in the *Altese* approach lies in its deceptively literal treatment of the statutory definition of the term "enterprise". What parades under the guise of rigorous fidelity to the text, turns out, upon examination, to read the "enterprise" element

entirely out of the statute. (*See United States v. Sutton*, 605 F. 2d at 265; *United States v. Anderson, supra*; and *United States v. Turkette, supra.*)

We are, of course, aware that *Sutton* was overturned *in banc*, but that merely highlights the dichotomy of interpretation which the circuits entertain in connection with the "RICO" statutes altogether.

Similarly, *Turkette* and *Anderson* destroy the claim that only a broad interpretation of enterprise will vindicate Congress' intent that "RICO" be liberally construed. Thus, *Turkette* and *Anderson* demonstrate that *Altese assumes* a legislative intent directly contrary to the statute's legislative history, and expands upon that *assumed* intent in direct violation of principles of due process, the rule of lenity, and the rule that Congress will not be lightly deemed to have significantly altered the federal-state balance. In sum, *Turkette* and *Anderson* demonstrate that there is no more merit to the reasoning of *Altese* than there is to its wishful and sublimely unrealistic characterization that the language of "RICO" concerning enterprise is "clear, precise and unambiguous".

We submit that this conflict, as we have already said, should be resolved by the grant of certiorari and the proclamation of a definitive decision on the law.

III.

SUBSTANTIAL ELECTRONIC SURVEILLANCE WAS CONDUCTED IN THE CASE AT BAR. THE WITNESS MONTELLA, AFTER HE BEGAN COOPERATING WITH THE GOVERNMENT, ALLEGEDLY CONSENTED TO THE USE OF ELECTRONIC LISTENING DEVICES IN CONVERSATIONS WHICH HE HAD WITH CERTAIN OF THE DEFENDANTS. WHILE ALLEGEDLY JUSTIFIED UNDER *UNITED STATES v. WHITE*, 401 U.S. 745, THAT CASE WAS PRIOR TO *KATZ v. UNITED STATES*, 389 U.S. 347, AND *WHITE* WAS A MERE PLURALITY OPINION OF THE SUPREME COURT. THUS, BOTH THE FOURTH AMENDMENT AND THE PETITIONERS' "REASONABLE EXPECTATION OF PRIVACY" RENDERED THE ELECTRONIC SURVEILLANCE UNCONSTITUTIONAL AND INADMISSIBLE WITHOUT COURT ORDERS.

The Government elected to use electronic surveillance in this case, probably in an attempt to corroborate the statements of their single most important witness, Montella.

The use of electronic surveillance where only one party consents to the eavesdropping has been employed very widely since this Court's decision in *United States v. White*, 401 U.S. 745. It, of course, had also been used previous thereto, but many law enforcement agencies apparently look upon *White* as authorization or *carte blanche* to use this method of electronic surveillance.

It is respectfully contended that *White* was a plurality opinion of this Court and was decided prior to *Katz v. United States*, 389 U.S. 347, 364.

Just a mere plurality of this Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States*, 343 U.S. 747 and *Lopez v. United States*, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of *Katz v. United States*, 389

U.S. 347, and we maintain should therefore be abolished. [*See Holmes v. Burr*, 486 F. 2d 55 (9 Cir. 1973), *cert. denied*, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in *United States v. White, supra*, mentioned the fact that it did not apply since this was pre-*Katz* eavesdropping.

Justice Black cast the swing vote in *United States v. White*, and his concurrence in the judgment of the Court was for the reason set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in *Linkletter v. Walker*, 381 U.S. 618." In *Linkletter*, Mr. Justice Black maintained that *Mapp v. Ohio*, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White*, Justice Black reasserted the position which he had taken in *Katz*, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States*, however, this Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of *Katz v. United States*.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; and (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial expressions, gestures, and other subtle details. Nor is a picture any more accurate. But the reliability

argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?" (Dissent of Hufstedler, J. in *Holmes v. Burr, supra.*)

The dissenting opinion in *Holmes v. Burr, supra,* went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation. . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States.* There the Court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subjected to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of the risk fictions relied on in *On Lee v. United States, supra,* 343 U.S. at 753-54 and *Lopez v. United States, supra,* 373 U.S. at 439. In *Lopez,* the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality in *United States v. White.*

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz.* Thus, *On Lee* and *Lopez* not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States,* 365 U.S. 505 (1961); *Osborn v. United States,* 385 U.S. 323; and *Berger v. New York,* 388 U.S. 41 and destroyed by *Katz. Rathbun v. United States,* 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. Section 605). *Schwartz v. Texas,* 344 U.S. 199 (1952), involved facts similar to *Rathbun,* but the decision was based on the pre-*Mapp* authority refusing to apply the exclusionary rule to state courts. *Schwartz* was overturned by *Lee v. Florida,* 392 U.S. 378 (1968), a post-*Mapp* case, holding inadmissible under Section 605 telephone conversations overheard on a party line and recorded. *Lewis v. United States,* 385 U.S. 206 (1966) and *Hoffa v. United States,* 385 U.S. 293 (1966), like *Holmes,* concerned the use of

confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes*. But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided, and *Katz* had been earlier held nonretroactive in *Desist v. United States*, 395 U.S. 244 (1969). *United States v. White*, is nevertheless important because it reveals continuing reliance by some of the justices on the assumption of the risk doctrine. [*See United States v. White*, at 754 (White, J.).]

Although the holding in *White* was based upon the nonretroactivity of *Katz*, several of the justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested that *On Lee* remained sound law. Justices Brennan, Douglas, Harlan and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz*. Mr. Justice Black, concurring in the judgment of the Court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that electronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr, supra,* sets forth cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 14 Cr. L. 2063, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

In *Gelbard v. United States,* 408 U.S. 41, 92 S. Ct. 2357, this Court held that the use of illegal electronic interceptions are proper defenses under certain circumstances. *See also, United States v. Giordano,* 416 U.S. 505, 94 S. Ct. 1820.

IV.

THE ELECTRONIC SURVEILLANCE WAS NOT PROPERLY MINIMIZED BECAUSE THE INDISCRIMINATE LISTENING FOR TWO MINUTES "ON" AND ONE MINUTE "OFF" WAS, IN EFFECT, A ROVING GENERAL OR EXPLORATORY SEARCH WHICH VIOLATED THE FOURTH, FIFTH, AND SIXTH AMENDMENT RIGHTS OF THE SUBJECTS OF THE ELECTRONIC "BUGGING".

In *United States v. Gigante*, 738 F. 2d 502 (2 Cir. 1976), a failure to comply strictly with requirements of 18 U.S.C. §§2510-2520 was deemed fatal and required suppression of the evidence. *(See also, People v. Sher*, 38 N.Y. 2d 600, and *People v. Nicoletti*, 35 N.Y. 2d 249.)

Section 2518(5) of 18 U.S.C. clearly requires strict minimization.

The representation by Mr. Alexander concerning the *Black* tax case turned out to be very much in error when five days later, the Government by order of Judge Jonas, turned over the "airtels" (intra-bureau messages) prepared by Agent Pennypacker (Transcript p. 596, December 18, 1967).

It is clear that secondary memoranda under *Black* surveillance which were turned over, thereafter revealed that the F.B.I. had a deep interest in the tax case to the point that the Kansas City Federal Bureau of Investigation Office was directed to identify all witnesses appearing before the *Black* grand jury which returned the tax indictment. There, as here, there was no doubt interchange with labor management and other agencies of the Federal Government.

It should also be remembered that the I.R.S. was involved in this investigation and, in fact, tax counts are included, as against Fiumara and others. *See* the petition for certiorari in *McGarry v. United States*, 1184, October Term 1967, No. 37,

October Term 1968. There it is revealed that Mr. Owen Burke Yung conducted one of the many wiretaps in Miami, Florida, on a gambling suspect. The tape recordings were sent to Yung in Washington. After listening to them, he would telephone information to the relevant field men conducting investigations. Yung made no records. He erased the tapes after he passed on all information. He did not tell the field man where he got the information. Wiretap admissions by the Department of Justice were to some extent based on Mr. Yung's questionable memoranda of "thousands of voices" heard three and four years ago. (*See* petition for a writ of certiorari, *McGarry v. United States, supra,* 4-10; typed transcript of testimony of Owen Burke Yung, pp. 109-153, before Sub-Committee on Administration Practice and Procedure of the Senate Committee on the Judiciary, April 4, 1967.)

It is for this, and other reasons, that we submit that the indiscriminate eavesdropping in Buzzanca's office and other indiscriminate eavesdropping was so prejudicial and should be condemned by this Court because there was no effort to minimize in any real sense.

United States v. White, supra, was a plurality opinion, as we have indicated. Cases like *White,* however, cannot be read as "consent search cases". First, this Court's opinion discussed *Katz,* not the third party consent cases. *Second, it would be anomalous to conclude that a search is made legal by the consent of the Government agency or agent conducting the search.*

Thus, if the invasion of privacy by electronic surveillance carried on the person of Montella is deemed a consent search, it is obvious that it falls far short of the requirements of the Fourth Amendment because no warrant was obtained.

Justice Harlan, in his dissenting opinion in *White,* 401 U.S. at 787-89, aptly observed:

> "Authority is hardly required to support the proposition that words would be measured a

> good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third party bugging a prevalent practice, it might well smother that spontaneity — reflected and frivolous, impetuous, sacreligious and defiant discourse — that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant." [*Cf. Mincey v. Arizona,* 437 U.S. 385, 98 S. Ct. 2408 and *Michigan v. Tyler,* 436 U.S. 499, 98 S. Ct. (1942).]

See also, Marshall v. Barlow's Inc., 436 U.S. 307, 98 S. Ct. 1816.

If *Barlow's, supra,* stands for the proposition that expectations of informational privacy must be considered vis-a-vis the government the planted spy becomes a ready subject of Fourth Amendment interest. Once informational privacy is recognized as an appropriate Fourth Amendment interest, and once this interest is defined vis-a-vis government, the voluntary disclosure rationale breaks down. By talking to a confidante, the defendant in *White* no more consented to governmental information gathering than did the defendant in *Barlow's* who permitted employees to observe his premises. (*Stoner v. California,* 376 U.S. 483, 489-90).

Indeed, if all else fails, the spy hypothetical should make the point. From the view of informational privacy interests against government, one would have a heavy burden explaining why the Fourth Amendment addresses the inspector's attempt to enter at

the front door to gather evidence and yet stands oblivious to the Government's undercover entry in the rear for the same purpose. (*See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 365, where the author asserted:

> "I can conceive of no rational system of concerns and values that restricts the government's power to rifle my drawers or tap my telephone but not its powers to infiltrate my home or my life with a legion of spys."

In fact, Amsterdam suggested that the Government's use of spys may be more intrusive than its use of third party electronic surveillance. *Id.* at 407-409.

In connection with the foregoing, the Court should have given *in haec verba* the entrapment charge on Count 84 that Buzzanca requested.

A. The entrapment charge was warranted.

Ever since 1932, when this Court decided *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413, the "defense" of entrapment has been recognized in the federal courts. The Second Circuit, by means of the opinion of Judge Learned Hand, provided the delineation of issues in *United States v. Sherman*, 200 F. 2d 880 (2nd Cir. 1952):

> "Two questions of fact arise: (1) did the agent induce the accused to commit the offence (sic.) charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence (sic.). On the first question the accused has the burden; on the second the prosecution has it." (200 F. 2d at 882).

Judge Hand's definition of "inducement," thereafter repeatedly adopted in the Second Circuit as well as many other circuits, includes "soliciting, proposing, initiating, broaching or

suggesting the commission of the offence (sic.) charge" (*id.* at 883). Thus the accused's burden as to this issue has been described as "relatively slight" [*United States v. Henry*, 417 F. 2d 267 (2nd Cir. 1969), *cert. denied*, 397 U.S. 953 (1970)]. This issue does not, however, include the degree of pressure exerted [*United States v. Pugliese*, 346 F. 2d 861, 863 (2nd Cir. 1965); *United States v. Jones*, 360 F. 2d 92, 96 (2nd Cir. 1966); *United States v. Riley*, 363 F. 2d 955, 958 (2nd Cir. 1966)].

In the case at bar, Mr. Montella suggested that Mr. Buzzanca accept $1,000 as a Christmas gift on December 12th, 1978 by broaching the subject with him as follows:

> "I got a little somethin' for ya for Christmas . . ." [Government Exhibit 414(A) at 2].

Mr. Buzzanca apparently ignored this statement (for some 32 pages) until Mr. Montella brought it up again, saying:

> "Go back to work, Tommy. This is a letter of with a thousand dollars, from me to you for Christmas." [Government Exhibit 414(A) at 34].

It was Mr. Montella, discussing the "gift," who explained the involuntary nature with the statement:

> "I'm forcing this on you." [Government Exhibit 414(A) at 37].

While the Government attempts to bolster its "propensity" argument with a claim of a prior payment in 1977, another factual issue is raised by Mr. Montella's statement on December 12, 1978 that:

> "You never took a nickel from me." [Government Exhibit 414(A) at 35].

These four quotations alone are sufficient, we respectfully assert, to meet Mr. Buzzanca's "slight" burden of proof with regard to Judge Hand's first issue of fact. Accordingly, the burden should shift to the Government as to the second issue.

The Government thus argues, as it must, that all other violations of Title 29 U.S.C. §186(b) included in the indictment and the subject of evidence introduced at the trial show "propensity." The short answer is that the violation set forth in Count 84 is out of character for Mr. Buzzanca — even according to the Government's theory of the case. Mr. Buzzanca is accused of receiving money as an agent for another; in Count 84, he is accused of receiving money for himself. The Government attempts to blunt this distinction by its argument that the Courts recognize no difference. However, in spite of the obvious legal difference [*see* charges of the Hon. Charles E. Stewart, Jr. in *United States v. Scotto and Anastasio,* 79 Cr. 32 (CES) given on November 11th, 1979, Tr. 7460-7461] it is the factual difference which is relevant here; not the legal difference. The possibility that no matter what Mr. Buzzanca's other crimes, if any there be, and general disposition, he might not have taken $1,000 from Mr. Montella on December 12th, 1978 unless confronted with inducements cannot be ignored. Other crimes do not forever outlaw even the criminal and open him to prosecutorial practices aimed at securing his repeated conviction, from which the ordinary citizen is protected.

The law is clear: "Where an issue of fact is presented regarding the existence of an inducement, 'the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be.' " [*United States v. Henry,* 417 F. 2d 267, 270 (2nd Cir. 1969), quoting *United States v. Riley,* 363 F. 2d 955, 959 (2nd Cir. 1966) (per Friendly, C.J.).] Here various issues of fact require submission to the jury:

(1) Did Mr. Montella induce Mr. Buzzanca to accept a $1,000 Christmas present on December 12th, 1978?

(2) If so, does the evidence tending to show that Mr. Buzzanca theretofore acted as a conduit for other payments made by Mr. Montella to Mr. Fiumara demonstrate — inspite of the tape of the December 12th, 1978 conversation — that Mr.

> Buzzanca was ready and willing without persuasion to take money for himself and that he was awaiting any propitious opportunity to do so?

It was plain error to refuse Mr. Buzzanca's requested charge on the defense theory of entrapment to Count 84.

V.

THE FAILURE TO HAVE GRANTED A SEVERANCE GRAVELY PREJUDICED THE PETITIONERS HEREIN SINCE EVIDENCE OF TOTALLY UNRELATED AND UNCONNECTED CRIMES WERE INTRODUCED AGAINST PETITIONERS, RELATING ONLY TO CO-DEFENDANTS, TO SAY NOTHING OF OTHER IRRELEVANT EVIDENCE WHICH WAS ADDUCED AGAINST OTHER DEFENDANTS, HAVING NO BEARING ON PETITIONERS HEREIN. THIS SPILLOVER PREJUDICE COULD NOT POSSIBLY BE CURED BY INSTRUCTIONS, WHICH, IN FACT, WERE VIRTUALLY NEVER GIVEN.

Substantial evidence was introduced linking co-defendant Michael Clemente with organized crime and with a million dollar illegal transaction involving Netumar Steamship Line, through Gerald Swanton, which had nothing whatsoever to do with the petitioners herein.

The court also permitted testimony concerning income tax counts against Clemente, which had nothing to do with the case herein.

It also allowed evidence that co-defendant Gardner had received illegal loans from employers of International Longshoremen's Association members.

It also permitted evidence concerning Gardner's failure to file income tax returns for four years and Gardner's failure to disclose a number of liabilities to banks from whom he applied for loans.

On top of this, the district judge permitted evidence of arson, as well as other criminal events, which supposedly took place at a bowling alley with which Gardner was affiliated.

None of these items had anything whatsoever to do with the petitioners herein.

We submit that with respect to petitioner Coppola, the error was even more pronounced because he was only convicted of the conspiracy count, and nothing else. This point is dealt with in considerable detail in the briefs in the court below.

The sheer length of the case, comprising over 20,000 pages, was *ipso facto* prejudicial to each petitioner and should have been avoided by the granting of severances.

VI.

THE CHARGE OF THE COURT WAS FATALLY DEFECTIVE, ESPECIALLY IN ITS DEFINING OF "WRONGFUL".

Coppola and Fiumara were not officers of any I.L.A. Union. Additionally, it must be borne in mind that there was no issue in this case of physical fear or fear of violence.

The trial court began its instructions on extortion (12570-12582)[2] by stating in broad terms the two independent elements that the jury must find in determining whether the alleged offenses were "wrongful":

> "the defendant . . . had no lawful right to the property obtained *and* that the property was obtained because of the victim's fear of economic loss." (Emphasis added.) (12576).

Thereafter, the judge confused one element with another, making them interdependent, ultimately permitting the jury to

2. Numerals in parentheses refer to pages of the offical court reporter's minutes of trial, unless otherwise indicated.

convict Coppola and Fiumara solely on their finding that Montella was motivated by a broadly defined fear of economic injury.

To begin with, under the trial judge's instruction, there was no issue in this case of physical fear or fear of violence: "The term 'fear' ", he instructed, "does not in this case refer to physicial fear or fear of violence." (12571). Rather, the element of fear will have been proved in this case, he explained, if the evidence shows that the payor of the money "had a state of anxiety, concern or apprehension of this type of anticipated economic loss to *or* adverse effect on business." (Emphasis added.) (12572). Nor, the judge instructed, must the fear "be the consequence of a direct threat . . ."; it is "sufficient that the surrounding circumstances render the victim's fear reasonable." . *Ibid.*

Having thus defined "*fear*", the court instructed the jury that if "you find beyond a reasonable doubt that the defendant . . . deliberately and intentionally utilized another person's *fear of economic loss* to obtain property from that person . . . then this first element of the extortion count is satisfied." (Emphasis added.) (12574).

Pausing at this juncture, it is clear that the court's definition — thus far — would include the vast majority of business and professional dealings conducted in this country; many lawyers, stockbrokers and insurance agents who obtain fees "deliberately and intentionally utilize [the client's] fear of economic loss to obtain property from that person." Indeed, in the context of the facts of this case, it is clear that the "fear of economic loss" was defined to include the fear of *failing to obtain* economic *gain:* the Government's allegation here was that the payor sought to obtain business that he did not have; and his alleged fear was that he would not obtain such new business — or retain it once he obtained it — unless he paid and continued to pay. If "fear of economic loss" is thus defined to include "failure to obtain economic gain", there is hardly a business or profession in any free market society that would not come within the court's expansive definition.

But the trial court's instruction became even more over-inclusive at this point. After instructing the jury — fleetingly at best — that it must find that the defendant had no lawful right to the property obtained, *and* also that the property was obtained because of the victim's fear of economic loss (12576), the court then proceeded to *change* its definition and instruct the jury that extortion is established if the defendant had no legitimate right to the property *or* if the "payment was induced by wrongful threat or fear of economic loss." Notwithstanding Coppola and Fuimara's status as private citizens who are not officers of any union, the judge gave the following instruction in the context of defining "wrongful":

> "[T]his statute does not prohibit any person from using his position of power or influence to *obtain legitimate economic ends.* The obtaining of money by one who is functioning as a salesman or a broker for the successful solicitation or referral of business, or for use of his influence, good will, or advice, does not in and of itself constitute extortion *unless you find that the payment of such monies was induced by wrongful threat or fear of economic loss."* (Emphasis added.) (12577).

The plain meaning of this instruction is that all such business activities *do* constitute extortion if the payment of monies *was* induced by "wrongful threat *or* fear of economic loss." This means that virtually all such businesses are, under the trial court's instruction, extortionate, since few people pay out money *unless* they fear loss, or hope for economic gain, by the payment of money for the services sought.

At this point in its lengthy instructions, the trial judge proceeded to invent a legal right that is utterly preposterous in a free market economy: he instructed the jury that "any company or individual has the *right* to obtain business from another company without making payments to a third party." (Emphasis added.) (12577). This instruction constituted nothing less than a peremptory direction to the jury that *all* middle-persons, facilitators, influence peddlers, agents, and brokers — who, by

definition, are third parties receiving payments for helping others to obtain business — have *no* legal or legitimate rights to such payments and are engaged in "wrongful" conduct. It will come as a great surprise to the American business community to learn about this newly discovered "right to obtain business . . . without making payments to a third party." Of course, no such right exists, as millions of businesspersons who give or receive such third party payments fully understand; in fact under certain circumstances it is improper to deal directly with a principal with whom one seeks to do business, and a requirement that the business must be obtained through a third party.[3]

We again urge that the court erred in submitting the Taft-Hartley counts because the case was presented to the jury on a theory of criminal liability not contained in the indictment, and the evidence was insufficient to establish guilt beyond a reasonable doubt, of aiding and abetting the violation of the Taft-Hartley Act.

Finally, the court and prosecution improperly interfered with the defense summation and injected extraneous matter into the trial of these counts.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

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3. In the court of appeals, because the record of trial was over 20,000 pages, counsel necessarily had to divide the work among them, and, we therefore ask this Court again to review the court of appeals briefs of all appellants because we believe they are significant herein.

APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 549, 550, 551, 552 and 553—September Term, 1980

(Argued November 5, 1980 Decided February 26, 1981)

Docket Nos. 80-1261, 80-1263, 80-1271, 80-1273, 80-1275

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL CLEMENTE, TINO FIUMARA, THOMAS BUZZANCA, VINCENT COLUCCI, CAROL GARDNER, MICHAEL COPOLLA and GERALD SWANTON,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge,*
FRIENDLY and MESKILL, *Circuit Judges.*

Appeals from judgments of conviction after a jury trial entered in the United States District Court for the

Southern District of New York, Leonard B. Sand, *Judge*, convicting the defendants of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d); the Hobbs Act, 18 U.S.C. § 1951; the Taft-Hartley Act, 18 U.S.C. § 186(b); the Internal Revenue Code, 26 U.S.C. §§ 7201 and 7206(1) (1976); and of committing perjury before a grand jury in violation of 18 U.S.C. § 1623 (1976).

Affirmed.

ALAN M. DERSHOWITZ, Cambridge, Massachusetts (Nathan Dershowitz, Jeanne Baker, David Fine, Cambridge, Massachusetts, Of Counsel, Richard Strafter, Holly Skolnick, John Batter, Joann Crispi, Cambridge, Massachusetts, On the Brief), *for Appellant Clemente.*

CARL M. BORNSTEIN, New York, New York (Barry A. Bohrer, New York, New York, Of Counsel), *for Appellant Colucci.*

HERBERT O. REID, SR., Howard University School of Law, Washington, D.C. (William A. Borders, Jr., Washington, D.C., Of Counsel), *for Appellant Gardner.*

IRVING ANOLIK, New York, New York, *for Appellants Buzzanca, Fiumara and Copolla.*

MAURICE M. MCDERMOTT, New York, New York (Paul R. Grand, Norman L. Ostrow, Grand & Ostrow, New York, New

York, Of Counsel), *for Appellant Swanton.*

MICHAEL S. DEVORKIN, Assistant United States Attorney, New York, New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Daniel H. Bookin, Ruth N. Glushien, Mary Jo White, Assistant United States Attorneys, New York, New York, Of Counsel), *for the United States of America.*

MESKILL, *Circuit Judge:*

This case concerns racketeering activity that has plagued waterfront businesses in New York and New Jersey. Judgments of conviction were entered in the United States District Court for the Southern District of New York after a twelve-week jury trial before Judge Sand. The indictment contained 213 counts, charging the defendants with engaging in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976); receiving bribes in violation of the Taft-Hartley Act, 29 U.S.C. § 186(b) (1976); conducting and conspiring to conduct an enterprise's affairs through a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c) and (d) (1976); evading taxes and filing false tax returns in violation of 26 U.S.C. §§ 7201 and 7206(1) (1976); and making false declarations before a grand jury in violation of 18 U.S.C. § 1623 (1976). A schedule listing the defendants' various convictions and the sentences imposed appears in the appendix.

Appendix A

BACKGROUND

The evidence offered by the government at trial depicted Michael Clemente as the ringleader of a highly organized enterprise that had infiltrated all aspects of waterfront business, including labor, shipping, and ship-servicing. Clemente's specific area of control was identified as the New York waterfront. The evidence described the other defendants as follows: Fiumara acted as the New Jersey waterfront "boss" but was subordinate to Clemente; Cepolla was a personal assistant to Fiumara; Gardner and Colucci were presidents of two New Jersey International Longshoremen's Association (ILA) locals and answered directly to Fiumara in connection with their illicit activities; Buzzanca was president of two New York ILA locals and conducted his activities under the supervision of Fiumara; and Swanton, a vice-president of a shipping company in New York, worked closely with Clemente.

The linchpin of the enterprise was its control of the ILA in New York and New Jersey; with this power it was able to extort monies from shipping companies and influence their decisions regarding the allocation of ship-servicing contracts. The latter influence empowered the enterprise to extort monies from the companies that provided services such as the lashing and carpentry work required in connection with loading and unloading cargo. Only those shipping companies and ship-servicing companies that paid the amounts demanded by the enterprise, or "did the right thing" in the argot of the waterfront, had their ships' cargo loaded and unloaded without interruption or obtained and retained contracts to provide their services. The evidence adduced at trial largely concerned dealings between each of the defendants and the govern-

ment's principal witness, William Montella, who was employed by several ship-servicing companies during the indictment years.

The Court-Authorized Surveillance

Between August 1977 and March 1978 the government monitored oral conversations through listening devices installed in Montella's offices, which had been authorized by court order pursuant to 18 U.S.C. §§ 2510-2520 (1976).[1] The intercepted conversations combined with physical surveillance of Montella provided the government with substantial proof of Montella's pattern of monthly deliveries of cash to the defendants Clemente and Buzzanca.[2] Montella was approached by the government in May 1978 and agreed to cooperate in June of that year.[3] From June through December 1978 Montella met with several of the defendants and successfully recorded sixteen of their meetings.[4]

Additionally, several consensual recordings made in the course of an independent New Jersey state investigation were admitted into evidence. In one conversation Fiumara promised a New Jersey undercover officer certain waterfront business and, in another, Copolla

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1 Six extension orders were issued to continue the surveillance. *See* 18 U.S.C. § 2518(5) (1976).

2 Court-authorized listening devices were also planted in Buzzanca's offices between March 1978 and June 1979. Conversations concerning arrangements of meetings between the various defendants and discussions about the extortion of waterfront companies were intercepted.

3 Montella agreed to plead guilty to two five-year felonies of conspiracy and one five-year felony for tax evasion.

4 During these meetings Montella used government funds to pay Clemente $7,000, Fiumara $4,000, Buzzanca $13,000, and Gardner $1,000.

described Fiumara's waterfront control and Copolla's own role as Fiumara's assistant.

The Netumar Account

From 1970 to 1972 New Jersey Export Co. (N. J. Export) served as the carpentry contractor for Netumar Steamship Line (Netumar), which operated from Pier 36 in Manhattan. At that time, Montella was the general foreman for N. J. Export. Montella testified that beginning in 1970 or 1971 defendant Swanton, then a vice-president of Netumar, threatened that unless Montella agreed to "do the right thing" Swanton would "throw them out" and find another company that would make the payoffs demanded. Swanton informed Montella that he was associated with Clemente, who was the behind-the-scenes boss who ran the East River Piers in Manhattan, and that some of the kickback money would be given to Clemente. When Montella asked Swanton how he was expected to raise the cash to make the payoffs, Swanton instructed him to inflate his materials bills. Montella agreed to make the payoffs and admitted that he later kept some of the money generated in this manner for himself.

When Montella left N. J. Export to join a Brooklyn-based company, C. C. Lumber Co., he asked Swanton whether his new employer could obtain the Netumar account. Swanton denied the request, asserting as his reason Clemente's dislike for Anthony Scotto, the Brooklyn ILA local president.

In June 1973 Montella left C. C. Lumber and joined Quin Lumber, another Brooklyn-based carpentry and lashing company. Quin Lumber's employees, like those of C. C. Lumber Co., belonged to the ILA Brooklyn local run by Anthony Scotto. In early 1974 Swanton called Montella and advised him that Clemente had resolved his

differences with Scotto and that, therefore, Montella's Brooklyn employer could now obtain the Netumar account. Thereafter, they arranged a meeting where Swanton told him: "Listen . . . go to the Shelton Health Club. Ask for Mike C. Give him 500. Give him 500 a month . . . . Give him 500 and make him happy." Montella testified that shortly thereafter he met Clemente at the Shelton Health Club, where the following exchange took place:

MONTELLA: Mike, I'm Sonny [Montella]. Gerry [Swanton] told me to come down. I'm with Quin Lumber and I'm going to be doing the carpentry work down there.

CLEMENTE: I hope you do the right thing. I hope you are not cheap.

MONTELLA: I'm going to give you 500 a month.

CLEMENTE: Okay. If you have any problems down there . . . let me know. Go out and make money.

Montella testified that some time in April or May 1974 he returned to the Shelton Health Club and handed Clemente $500 in cash in a white envelope. Thereafter, Montella delivered $500 in the same manner once a month through December 1976. Montella testified that he continued to make the payments because he feared that if he stopped he would lose the Netumar account.

In 1976 Montella placed a bid with Netumar for the contract to perform the lashing work in addition to the carpentry services his company already was providing. When Montella's bid was rejected, he approached Clemente for assistance. Clemente gave Montella instruc-

tions; Montella followed them and was subsequently awarded the lashing contract with Netumar. Later, Clemente asked for another $500 per month and Montella acquiesced. Thereafter, from January 1977 through December 1978 Montella paid Clemente $1,000 in cash at their monthly meetings at the Shelton Health Club.

During the same period in which Clemente was receiving payoffs from Montella, he had also arranged to receive $200,000 per year from Netumar itself. When Netumar began its operations at Pier 36 in Manhattan, it believed that it was being grossly overcharged by its stevedore, United Terminals, Inc. (United). Charles Mattman, Netumar's president, approached officials of United and attempted to negotiate a reduction of the $800,000 annual equipment rental fee it was paying or to buy the equipment outright. United offered to sell the equipment for $1 million, a price considered excessive by Mattman. Mattman then approached Clemente for assistance. Clemente offered to intervene provided that Mattman agreed to pay him 25 cents for each dollar Clemente saved Netumar. Following Clemente's intervention United sold the equipment for $300,000. Thereafter Netumar paid Clemente $200,000 in quarterly cash installments each year. Netumar made these payments from 1973 through 1978 in restaurants in Brooklyn and Manhattan.

The Concordia Line Account

In June 1975 another shipping company, the Concordia Line, decided to move its operation from Hoboken, New Jersey, to Newark. Castelo and Sons Ship Servicing Co., which had been providing the lashing work for Concordia in Hoboken about this time, was approached by defendant Carol Gardner, the president of the black ILA local in Newark. Gardner advised Manuel Castelo and Joseph

Castelo, Jr. that they would have to pay him certain amounts of money to retain the Concordia account once it moved to Newark. The Castelos, who were friends of Montella, informed him about Gardner's demands.

Montella subsequently contacted Gardner and inquired about the Concordia Line account. Gardner told Montella to meet him and his "partner," defendant Vincent Colucci, in Miami to discuss the matter. Colucci was then president of the white ILA local in Newark. Montella met with Gardner in Miami but did not reach a final agreement. They continued their discussions in New York, where Montella ultimately agreed to pay Gardner and Colucci $10,000 cash up front and $2,000 cash each month for the Concordia Line account. Montella also agreed to pay secretly to Gardner an additional $10,000 cash and promised not to disclose this clandestine payment to anyone, including Colucci. In August 1975 Montella met with Gardner and handed him $20,000 in cash. In September 1975 Montella was advised by a Concordia Line official what rates to bid and shortly thereafter was awarded the contract.

Although it had been agreed that Gardner and Colucci would share Montella's $2,000 monthly payoffs, Montella soon began to receive separate demands for the money from each of them. Each month Montella paid Gardner but, nevertheless, received an additional demand from Colucci. Montella arranged a meeting among the three of them to attempt to straighten out the problem, but the meeting achieved less than satisfactory results.

Afraid that he would continue to be "double-banked," as he later termed it, by Gardner and Colucci, Montella arranged a meeting with Clemente to seek his assistance. Montella met with Clemente at the Shelton Health Club in December 1975 and explained the situation to him.

Clemente informed Montella that had he approached him initially he could have avoided paying any money to Colucci and Gardner. Clemente admonished Montella, however, that "[n]ow you made a commitment you got to live up to it." Although Clemente insisted that Montella live up to his "commitment," he advised him to see the defendant Buzzanca and "tell him you are with me and tell him the story."

Subsequently, Montella adventitiously met Clemente and Buzzanca at a restaurant in Brooklyn. Clemente introduced Montella to Buzzanca and requested that he recount his story to Buzzanca. Buzzanca apologized to Clemente for the trouble that Montella had experienced and promised to clear up the problem. Buzzanca told Montella to make the monthly payments directly to him in the future. When Gardner and Colucci next called him, Montella informed them that he had been instructed not to make his monthly payoffs to them any longer and that they would be receiving instructions as well. Montella did not again hear from Gardner or Colucci in connection with this matter.

Montella complied with Buzzanca's directions and paid him $2,000 cash at Buzzanca's office. The first payment was made in the presence of defendant Fiumara, whom Buzzanca had asked to listen to another rendition of Montella's Concordia story. Montella continued to deliver the $2,000 cash payments to Buzzanca at his office or in the men's room of a New York restaurant.[5] Montella testified that the payments he made to Buzzanca were handed over to Buzzanca's boss, defendant Fiumara. The

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5 On several occasions Fiumara's assistant, Copolla, came by Montella's offices and picked up the payoff money. On one occasion Laurence Ricci, another assistant to Fiumara, picked up a payment at Montella's offices.

payments continued through December 1978 when Fiumara himself picked up a $2,000 payment.

The Chilean Line Account

In 1975, during the same period in which Gardner and Colucci succeeded in coercing Montella to pay $2,000 per month for the Concordia Line account, they advised Montella that unless he paid them an additional $2,000 per month he would lose his account with the Chilean Line. Montella protested that he had obtained the Chilean account many years before in Brooklyn, and that it would be unfair to demand cash from him to retain it. Gardner replied, "Wrong, that's my account," and advised Montella that to retain the account he had to pay the amount they were demanding. Montella testified that the following dialogue ensued:

MONTELLA: I got to get out? Just like that I got to get out?

GARDNER: That's it.

COLUCCI: That's it.

MONTELLA: First I buy the Concordia Line and now all of a sudden I am getting thrown out of the Chilean Line.

GARDNER & COLUCCI: That's what the boss said, the boss wants you out.

MONTELLA: The boss, who is the boss? I thought you were the boss.

GARDNER: You don't know who the boss is?

MONTELLA: No.

GARDNER: T is the boss.

Montella testified that "T" was the defendant, Tino Fiumara. Montella subsequently advised the vice-president of the Chilean Line that he would no longer "do his vessels in the Port of New Jersey . . . because it was just a little too expensive . . . to do his business."

Clemente and Fiumara—The Bosses of the Enterprise

The government introduced tape recordings of conversations in which several of the defendants professed their loyalty to defendant Fiumara and recognized his authority over them. Buzzanca, for example, stated on one occasion:

> Tino's good point is that everybody fears and respects him. That's a good thing. . . .
>
> * * * * *
>
> I love Tino and I would do anything in the world . . . .
>
> * * * * *
>
> I love him. I love him. And I got to. Ya know like, and I live with him everyday. I absolutely think, if this guy tempers himself, he'll be, ten years from now, he'll be awesome. . . . He'll have the best of two worlds. Good sense, good judgment. Plus, which we all live under fears. Ya need to have that balance . . . . [W]e'll make money. We'll steal it, if we have to.
>
> * * * * *
>
> Somehow I get in fact, I notice in Tino and more than Mike. I come from the greatest guy in the world.

On another occasion, the following statement was made by defendant Gardner concerning defendant Fiumara:

> I don't make no move until I, you know, check with, I do the right . . . . I don't have the last decision.
>
> I say I'm very loyal to this guy.

Additionally, the government offered evidence of numerous instances in which Fiumara coordinated activities and meetings among Copolla, Buzzanca, Colucci, and Gardner.

Fiumara's authority on the waterfront, however, was not supreme. The government introduced a great deal of evidence demonstrating that Fiumara was subordinate to Clemente. For example, Clemente's handling of Montella's problems with Gardner and Colucci, who answered directly to Fiumara, demonstrated Clemente's power to control Fiumara's subordinates, and thus Fiumara. Additionally, in 1978 Clemente was able to arrange increased business for Montella on the New Jersey waterfront, Fiumara's territory, illustrating Clemente's commanding position in the enterprise. After Fiumara acceded to Clemente's request that Montella be given more business, Clemente boasted that "Tino give me some satisfaction." Finally, Clemente took steps to protect the enterprise from investigations, evincing his patriarchal role. F example, the government introduced evidence that Cl mente obtained a secret New York Waterfront Commission document containing information about federal electronic surveillance of Montella, Buzzanca, Gardner, Colucci, and others.

Appendix A

The Defendants' Case

Of the defendants, only Gardner and Swanton testified. Gardner denied all of the allegations that had been asserted against him and stated that he was the victim of a racially motivated conspiracy by the government against blacks. Swanton also contested the charges brought against him and testified that, contrary to his own previous grand jury testimony, he had not possessed the power to choose the carpentry and lashing contractors for Netumar. He testified that he did not believe that Clemente had any influence on Pier 36 in Manhattan.

I.

The Hobbs Act Counts

Defendant Clemente asserts that his convictions for extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976), require reversal because the district court's charge was incorrect and because, in any event, insufficient evidence was introduced to sustain them. We conclude that both of these arguments are meritless.

Section 1951 provides in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts to conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"Extortion" is defined in the Hobbs Act as

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2). Clemente's principal contention with respect to the court's charge on the extortion counts is that the trial court improperly charged the jury on the element of wrongfulness.

Extortion, as defined in the Hobbs Act, consists of the use of wrongful means to achieve a wrongful objective. *United States v. Enmons*, 410 U.S. 396 (1973). The Supreme Court's decision in *Enmons* teaches that the applicability of the Hobbs Act to cases such as the one before us depends on whether the statutorily identified means ("actual or threatened force, violence, or fear") have been put to "wrongful use", *i.e.*, have been employed to obtain property to which "the alleged extortionist has no lawful claim." *United States v. Enmons, supra*, 410 U.S. at 400.[6]

The trial court charged the jury on the elements of extortion as follows:

> First, what is an "extortion"?
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force or fear.
>
> * * * * *
>
> Now, we have said that the word "extortion" means the obtaining of property from another, with his consent induced by the wrongful use of actual or threatened force or fear. In this case, the governmen

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[6] In *Enmons*, the Court held that the Hobbs Act has no application to cases involving "the use of violence to achieve legitimate union objectives." 410 U.S. at 400. Specifically, the Court declared that where the objective is higher wages in return for "genuine" services, the Hobbs Act is inapplicable, notwithstanding that violence has been used to exact such higher wages. The Court emphasized, however, that cases involving the use of the statutorily proscribed means to obtain "imposed, unwanted, superfluous and fictitious services" do come within the purview of the Hobbs Act.

contends that property was obtained through threats and fear of economic loss.

* * * * *

In the context of the statute with which we are concerned, . . . fear means that the alleged victim of the charged extortion feared possible financial injury caused by interference with the right to solicit and obtain business or with the right to retain work.

* * * * *

Let me explain to you how the word "wrongful" applies to your consideration of these counts.

"Wrongful" means that in order for you to find that any of the acts of extortion alleged in these counts were, in fact, committed, you must find beyond a reasonable doubt that the defendant or defendants you are considering had no lawful right to the property obtained, and that the property was obtained because of the victim's fear of economic loss.

* * * * *

If you find that threats were made or that fear was reasonably aroused, and if you find that the purpose of the defendant you are considering was to obtain money for himself or others to which they were not entitled, then I instruct you that the element of wrongfulness has been established.

Clemente insists that, in view of the court's charge, the jury could have convicted him solely upon finding that he used fear of economic loss to obtain money from Montella. He contends that the use of fear of economic loss is not inherently wrongful, but rather represents a device

routinely used in legitimate business transactions, and claims that merely using fear of economic loss to obtain money does not render the receipt of such money wrongful. Thus, he asserts that the requirement set forth by the Supreme Court in *Enmons*, that both the "means" and the "objective" be wrongful to constitute extortion within the meaning of the Hobbs Act, *see* 410 U.S. at 400, was not adequately conveyed to the jury by the district court's charge.

We are satisfied that the charge correctly instructed the jury on the wrongfulness element of the crime of extortion. The thrust of the district court's charge when read as a whole, *see Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973), was that the use of fear of economic loss to obtain property to which one is not entitled is wrongful. It is obvious that the use of fear of financial injury is not inherently wrongful. And precisely because of this fact, the "objective" of the party employing fear of economic loss will have a bearing on the lawfulness of its use. In this regard, Judge Sand instructed the jury that the wrongfulness element of the crime would be satisfied upon finding that fear of economic loss was employed by the defendants to obtain money to which they were not lawfully entitled.

Defendant Clemente interprets *Enmons* as limiting the scope of the Hobbs Act to embrace only those cases in which the means and the objective of the alleged extortionist, when viewed *apart* from each other are each wrongful. While this interpretation of the Hobbs Act may be applicable to cases concerning union demands for higher wages, at least one Circuit has questioned whether the Supreme Court's decision in *Enmons* requires that the statute be so strictly construed in other contexts. *See United States v. Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979),

cert. denied, 444 U.S. 1043 (1980). In *Cerilli,* a case involving lessors of road maintenance machinery who were forced to make political contributions to obtain contracts with a municipality, the Third Circuit determined that the "manner" in which the property is obtained has a bearing on whether the objective, "obtaining the property from another," is legitimate. In other words, the Third Circuit declined to evaluate the "objective" of the defendants in a vacuum, independent of the conduct involved.

The converse situation exists in this case. Fear of economic loss is not an inherently wrongful means; however, when employed to achieve a wrongful purpose, its "use" is wrongful.

Nor do we agree with Clemente that the court's charge on extortion was improper because it would embrace a broad spectrum of legitimate business transactions. Judge Sand specifically instructed the jury that the Hobbs Act

> does not prohibit any person from using his position of power or influence to obtain legitimate economic ends. The obtaining of money by one who is functioning as a salesman or a broker for the successful solicitation or referral of business, or for use of his influence, good will, or advice, does not in and of itself constitute extortion unless you find that the payment of such monies was induced by wrongful threat or fear of economic loss.

This instruction insured that the jury would distinguish the influence peddler who is lawfully entitled to receive compensation for his legitimate services from persons such as Clemente who exact tribute from their victims in exchange for agreements either to exercise or refrain from exercising the corrupt influence they have acquired.

We conclude, therefore, that the charge was legally sufficient. *See generally United States v. Brecht*, 540 F.2d 45, 52 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977); *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962).

Clemente also attacks the sufficiency of the evidence admitted against him in connection with the Hobbs Act violations. The verdict of a jury must be sustained "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942); *accord, Hamling v. United States*, 418 U.S. 87, 124 (1974). We are satisfied that the government introduced ample proof to demonstrate convincingly that Clemente had no lawful claim to the monies he obtained from Montella. The government established that Clemente's influence with Netumar depended upon his power to call for work stoppages unrelated to any bona fide labor dispute and his willingness to exercise that power for his own personal benefit. Moreover, the circumstances surrounding the actual payoffs, such as the clandestine meetings in secluded areas arranged by Clemente to conduct those transactions, clearly reflect their illicit nature.

Montella testified that Clemente made numerous statements during those meetings concerning his power over the waterfront industry. Clemente explained how the enterprise functioned and told Montella which ILA officials were under his control. Clemente boasted, for example, that he had had great influence in the appointment of Fred Feld as General Organizer of the ILA and that he was grooming Scotto to be Feld's successor. Montella testified that Clemente's statements to him convinced him that Clemente was the power behind the Manhattan piers and that, therefore, he could easily take the Netumar account away from him if he chose to do so. Moreover,

other proof of Clemente's guilty state of mind was introduced at trial. For example, when Clemente learned of a pending waterfront investigation, he admonished Montella never to use his name on the telephone and not to arouse suspicion. On another occasion, Clemente advised Montella that he knew that certain ILA officials would be indicted for extortion and tax evasion; Clemente went so far as to arrange a meeting with Montella and Anthony Scotto to discuss the threat the waterfront investigation was posing to their conspiracy. Finally, in June 1978 Clemente advised Montella that if anyone, including Scotto, betrayed him, "His life won't be worth two cents. In twenty-four hours he'll be gone."

Here, the defendants used fear of economic loss to obtain money to which they had no lawful claim. Notwithstanding defendant Clemente's argument to the contrary, it is clear that a wrongful purpose, obtaining money to which they had no lawful claim, was the aim of the defendants. Thus, the utilization of fear of economic loss to achieve that goal was wrongful. This being the case, the wrongful means and wrongful use elements of the crime of extortion were met.

Swanton's Aiding and Abetting Convictions

Defendant Swanton was convicted on 56 counts of aiding and abetting Clemente's extortion of payoff money from Montella between April 1974 and December 1978. Swanton contends that the district court's charge concerning these counts was improper. Additionally, Swanton attacks the sufficiency of the evidence. We conclude that neither of these challenges has any merit.

To aid and abet the commission of a crime, a defendant must "in some sort associate himself with the venture, . . . participate in it as something that he wishes to bring

about, [and] seek by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); *see generally Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977); *United States v. Mariani*, 539 F.2d 915, 919 (2d Cir. 1976); *United States v. Garguilo*, 310 F.2d 249, 252-53 (2d Cir. 1962).

Paraphrasing Judge Learned Hand's language in *Peoni*, the district court charged the jury:

> First, as you no doubt recall from my previous remarks, in order to find that a defendant was an aider and abettor, you must find beyond a reasonable doubt that he had an interest in the crime charged, that is, that he in some way knowingly associated himself with the criminal act alleged, that he participated in it as something he wished to bring about, that he sought by his action to make it succeed.
>
> In your deliberations as to whether Mr. Swanton aided and abetted in these counts, you must consider whether the evidence demonstrates beyond a reasonable doubt that he participated in it as something that he wished to bring about, *that he sought by his action to make it succeed with respect to each payment alleged in each count*—the $500 a month payment from April 1974 through December 1976, and the $1,000 a month payments from January 1977 through December 1978.
>
> * * * * *
>
> If you find, however, that the scheme we are discussing in fact existed but that Mr. Swanton at some point affirmatively disassociated himself from it, then you may not consider against him the acts

and the declarations of other participants in the scheme after that date. (Emphasis added).

Swanton claims, citing *United States v. Garguilo*, 310 F.2d 249 (2d Cir. 1962), that the district court's charge was too general; he argues that the jury should have been instructed that Swanton's introduction of Montella to Clemente in April 1974 alone could not be the basis of liability under the *Peoni* standard and the facts of the present case. The *Garguilo* case, however, is readily distinguishable from the one at bar. In *Garguilo*, a case involving counterfeiting, the evidence against the defendant Macchia consisted solely of testimony about his "presence" at a few sessions in which the defendant Garguilo practiced his art or attempted to prepare a counterfeit plate. Because the trial court in the course of its charge never told the jurors "in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime," *United States v. Garguilo, supra*, 310 F.2d at 254, this Court reversed and remanded the case for a new trial. Here, however, the jury was "plainly" charged that a conviction of Swanton for aiding and abetting Clemente required that they find that Swanton "sought by his action to make [the scheme] succeed with respect to each payment alleged in each count." Plainer language concerning Swanton's purposiveness could hardly have been delivered.

Swanton also argues that insufficient evidence to support his conviction for aiding and abetting Clemente was introduced at trial. He contends that merely introducing Montella to Clemente in April 1974, in connection with the Netumar account, could hardly serve as a sufficient

factual predicate for imposing criminal liability for the payoffs to Clemente during the following four and one-half years. Moreover, Swanton claims that the fact that he did not receive any benefit from the transactions he facilitated between Clemente and Montella illustrates that he had no interest in seeing that the venture succeed. But whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act. *See United States v. Green*, 350 U.S. 415, 420 (1956); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Trotta*, 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964). Rather, the controlling issue here is whether sufficient evidence was introduced at trial for the jury to conclude that Swanton purposively sought to make the kickback scheme succeed. This might have been a close question had the government not introduced evidence of Swanton's history of similar extortionate acts involving the same parties. Around 1970 or 1971, when Montella was employed by N. J. Export and was servicing the Netumar Line, Swanton had demanded that Montella kickback monies to him to retain the account. Thus in 1974, when Swanton contacted Montella, who at the time was employed by Quin Lumber, and instructed him to pay Clemente $500 per month to regain the Netumar account, the jury was entitled to infer that Swanton intended to create a scheme similar to the one in which he had actively participated a few years before.

Appendix A

II.

Clemente's Taft-Hartley Convictions

Clemente was convicted on 35 counts of aiding and abetting the receipt of money by Buzzanca, a labor official. Clemente claims that there was a variance between the crimes charged in his indictment and those for which he was convicted. Specifically, Clemente contends that while the indictment charged him with aiding and abetting the *receipt* of illegal labor payments, in violation of 29 U.S.C. § 186(b) (1976), the proof at trial demonstrated, if anything, that he aided and abetted the *making* of those illegal payments, in violation of 29 U.S.C. § 186(a) (1976). We conclude that in light of the great quantity of proof introduced by the government concerning the key role that payoffs to union leaders played in the overall scheme of the criminal enterprise, the limited direct proof of Clemente's purposiveness in assisting Buzzanca's illegal receipt of the monies was sufficient to support Clemente's conviction on these counts.

It is clear from the record that Clemente facilitated the arrangement between Montella and Buzzanca. Montella informed Clemente in 1975 about the trouble he was experiencing in connection with his payoffs to Gardner and Colucci concerning the Concordia Line account. Clemente advised Montella that he would have to live up to the commitment he made, but that he should "go see this kid Tommy Buzzanca, tell him you are with me and tell him the story." Shortly thereafter, Clemente introduced Montella to Buzzanca at an unplanned rendezvous in Ponte's restaurant in lower Manhattan. At Ponte's, Buzzanca assured Clemente that "I'll take care of it from here," and told Montella in Clemente's presence to "see me in my office every month. Don't see them [Gardner

and Colucci] anymore." Thus, the record shows that Clemente assisted both parties to the transaction.

At trial Judge Sand charged the jury that "the government contends that the defendants Clemente, Fiumara and Copolla aided and abetted the defendant Buzzanca, a labor official, to request, demand or receive payments from Mr. Montella." While the proof adduced at trial might have made a stronger case against Clemente for aiding and abetting Montella's making the payoffs as opposed to Buzzanca's receiving them, we are satisfied that the evidence is sufficient to sustain Clemente's conviction for the latter. The government correctly observes that there is no authority for the "proposition that a defendant who aids and abets both parties to an illegal transaction cannot be convicted for aiding and abetting both." All of the authorities cited by Clemente are simply inapposite.

III.

The RICO Counts

Defendants Clemente, Fiumara, Buzzanca, Colucci, and Gardner, were convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1976), and conspiring to violate that statute, 18 U.S.C. § 1962(d) (1976). Defendant Coppola was convicted of conspiring to violate RICO. All of the defendants claim that the enterprise charged in the indictment, a "group of individuals associated in fact" having no legitimate purpose, is outside the scope of the term "enterprise" as it is employed in RICO. *See* 18 U.S.C. § 1961(4) (1976). Additionally, the defendants claim that the RICO conspiracy count against each of them is unconstitutionally vague. We reject both of these conten-

tions. In *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), we held that the term "enterprise" embraces both legitimate and illegitimate enterprises. This Court recently adhered to the position taken in *Altese* in *United States v. Errico*, slip op. 423, 430 (2d Cir. Dec. 1, 1980), and *United States v. Mannino*, slip op. 333, 348 (2d Cir. Nov. 18, 1980). Since our decisions in *Errico* and *Mannino*, in which we noted the split of authority on this issue, the Sixth Circuit reached a result in line with *Altese* in an *in banc* decision in *United States v. Sutton*, Nos. 78-5134-39, 78-5141-43 (6th Cir. Dec. 3, 1980), *rev'g United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979). Only the First and Eighth Circuits have adopted a contrary view. *See United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3525 (U.S. Jan. 27, 1981); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980). Although we decline this opportunity to review our position taken in *Altese*, we note in passing that the purpose of the "enterprise" here was the establishment of a pattern of racketeering activity in a legitimate business, the waterfront industry.[7]

Defendants claim that since the enterprise charged in the indictment, an association in fact, was itself a conspiracy, a charge that the defendants conspired to create the enterprise is unintelligible. We agree with the Fifth

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[7] In a case strikingly similar to the one at bar that also involved waterfront corruption, the Third Circuit cogently stated:

> The purpose of RICO—prevention of infiltration of legitimate business by racketeers—would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses . . . . We decline in this case to construe the RICO statute so as to allow the appellants a defense that they made sure *not* to engage in any *legal* activity.

United States v. Provenzano, 620 F.2d 985, 993 (3d Cir. 1980) (emphasis in original).

Circuit which squarely confronted and rejected this contention in *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980):

> We conclude that Count One of the indictment properly charged a conspiracy to conduct the affairs of a § 1961(4) enterprise through racketeering activities, the nature of which was precisely stated, and adequately informed defendants that the enterprise whose affairs they conspired to conduct was one which they, by their association, had formed. *See United States v. Hawes*, 529 F.2d 472, 479 (5th Cir. 1976). That the formation of the enterprise and the conception of the conspiracy may have occurred simultaneously in no way detracts from the Act's applicability.

603 F.2d at 545-46.

Finally, the defendants claim that the district court's charge to the jury concerning the RICO conspiracy counts was improper. The defendants, however, failed to object to this portion of the court's charge and thus waived any objection they may have had in this regard. Fed. R. Crim. P. 30. *See, e.g., Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *United States v. Vila*, 599 F.2d 21, 25 (2d Cir.), *cert. denied*, 444 U.S. 837 (1979) (alternate holding); 8A J. Moore Federal Practice ¶ 30.04 (2d ed. 1980).

IV.

Defendant Gardner's Cross-Examination

Defendant Gardner claims that he was unfairly cross-examined and that his previous Taft-Hartley conviction was improperly admitted at trial.

Gardner testified on direct examination that he had never received any payoff money from Montella; that hundreds of thousands of dollars of loans accounted for his possession of large sums of money in the indictment years; that he received no loans as a result of his ILA position; and that his prosecution was racially motivated. On cross-examination the government sought to establish that Gardner deliberately burned his personal and business financial records shortly after receiving a subpoena for their production, and that some of his loans were received as a result of his ILA position. Gardner was questioned about having filed false loan applications, and three of these applications were admitted into evidence. Additionally, after questioning Gardner about checks he had purportedly received from waterfront employers for charitable affairs, the government established that the "charities" were frauds and that Gardner had kept the monies for himself. Finally, after Gardner denied that he had received any loans by reason of his union position, the government was permitted to prove that Gardner was convicted for receiving such a loan from a waterfront businessman in 1979.

The defendant contends that Judge Sand failed to consider the prejudicial effect of the impeachment evidence used against him pursuant to Rule 403 of the Federal Rules of Evidence.[8] We are satisfied, however, that Judge Sand did not abuse the broad discretion afforded to him under Rule 403. *See generally United*

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8 Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

States v. Benedetto, 571 F.2d 1246, 1251 (2d Cir. 1978); *United States v. King*, 560 F.2d 122, 128 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977). The government's impeachment of Gardner fell into three general categories: (1) inquiries into conduct of the defendant that bore on his character for truthfulness, (2) extrinsic evidence of specific acts, and (3) evidence of a prior conviction. The first two categories fall within Rule 608(b)[9] of the Federal Rules of Evidence, the third within Rule 609(a).[10]

We conclude that the court did not abuse its discretion in allowing the government to inquire into the destruction of Gardner's personal and business records. *See United States v. Graham*, 102 F.2d 436, 442 (2d Cir.)., *cert. denied*, 307 U.S. 643 (1939). The evidence was indisput-

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9 Fed. R. Evid. 608(b) provides:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

10 Fed. R. Evid. 609(a) provides:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

ably relevant to and probative of Gardner's untruthfulness. Likewise, the government's inquiry into Gardner's loan transactions was entirely proper. Gardner had injected the subject into the case in his direct testimony, and the government was entitled to pursue the subject on cross-examination. *United States v. Hockridge*, 573 F.2d 752, 761 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978); *United States v. Benedetto, supra*, 571 F.2d at 1250-51. Similarly, the government's inquiries on cross-examination into Gardner's acceptance of checks from Montella and others for the purported charitable affairs were permissible to refute Gardner's direct testimony that he had never taken money for illicit reasons from Montella. We are thus satisfied that the government's inquiries on cross-examination were permissible under Rule 608(b).

The admission of the fraudulent loan applications, however, is another matter. Rule 608(b) explicitly provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking his credibility . . . may not be proved by extrinsic evidence." Even assuming, however, that the loan applications were improperly admitted to prove facts collateral to the charges in the indictment, in view of the substantial evidence introduced against Gardner,[11] we are convinced that any error in their admission was harmless.

Gardner's complaint that his prior conviction should not have been admitted under Rule 609(a) simply does not withstand analysis. The evidence of his conviction was not admitted until Gardner denied the facts underlying

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[11] Three different employees testified that they personally paid Gardner $200,000 in illegal cash payoffs, and the testimony of three other eyewitnesses corroborated these payoffs. And finally, a tape recording in which Gardner admitted receiving the illegal cash payments was introduced.

the conviction. Moreover, Gardner actually requested that it be admitted. The record reveals that Judge Sand bent over backwards to guard defendant Gardner from being unduly prejudiced. Following Gardner's first denial of the facts underlying his previous conviction, Judge Sand gave him another "chance" to testify truthfully before permitting the government to impeach him with evidence of the conviction.

We have carefully considered all of the defendants' other contentions and find them to be without merit. Accordingly, the judgments of conviction are affirmed.

APPENDIX

Defendant (Total Prison Term; Total Fine; Total Counts)	Counts	Charge	Term of Imprisonment	Fine
MICHAEL CLEMENTE (20 years; $50,000; 103 cts.)	1	RICO	20 years	$25,000
	2	RICO Consp.	20 years	
	49-83	Labor payments	6 mo. each other; conc. to Cts. 1 & 2)	
	87-142 200, 202, 204, 206 208	Extortion Tax Evasion	20 years each 4 years each (consec. to each other; conc. to all others)	$ 5,000 each
	201, 203, 205, 207, 209	Filing False Tax Returns	3 years each (consec. to each other; conc. to all others)	
TINO FIUMARA (25 years; $10,000; 74 cts.)	1	RICO	20 years	$10,000
	2	RICO Consp.	5 years	
	14-48	Extortion	20 years each	
	49-83	Labor payments	6 mo. each (consec. to each other; conc. to Ct. 1)	

	210, 211	Filing False Tax Returns	2½ years each (consec. to each other; conc. with Ct. 2)	$ 5,000
THOMAS BUZZANCA (10 years; $5,000; 73 cts.)	1	RICO	10 years	$ 5,000
	2	RICO Consp.	10 years	
	14-48	Extortion	10 years each	
	49-83, 84	Labor payments	3 mo. each (consec. to each other; conc. to others)	
VINCENT COLUCCI (5½ years; $5,000; 12 cts.)	1	RICO	5½ years	$ 5,000
	2	RICO Consp.	5½ years	
	3-6, 13	Extortion	5½ years each	
	8-11	Labor Payments	1 year each (consec. to each other; conc. to all others)	
	212	Filing False Tax Returns	3 years	

Defendant (Total Prison Term; Total Fine; Total Counts)	Counts	Charge	Term of Imprisonment	Fine
CAROL GARDNER	1	RICO	10 years	$ 5,000
(10 years;	2	RICO Consp.	10 years	
($5,000; 13 cts.)	3-6, 13	Extortion	10 years each	
	8-11, 85	Labor payments	1 year (consec. to each other; conc. to all others)	
	213	Filing False Tax Returns	3 years	
MICHAEL COPOLLA (13 years; 1 ct.)	2	RICO Consp.	13 years	
GERALD SWANTON	87	Extortion	5 years	$ 5,000
(5 years; $5,000;	88-142	Extortion	5 years each	
60 cts.)	196-199	False Statements	5 years each (conc. to each other)	

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and eighty-one.

Present:

HON. WILFRED FEINBERG, Chief Judge
HON. HENRY J. FRIENDLY
HON. THOMAS J. MESKILL,
Circuit Judges,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL CLEMENTE, THOMAS BUZZANCA, TINO FUIMARA, MICHAEL COPOLLA, CAROL GARDNER, GERALD SWANTON, VINCENT COLUCCI, MANUEL CASTELO, JR., JOSEPH CASTELO, CASTELO & SONS SHIP SERVICING INC., GEORGE ZAPPOLA, ROBERT MELLI,

Defendants,

Appendix B

MICHAEL CLEMENTS, THOMAS BUZZANCA, TINO FUIMARA, MICHAEL COPOLLA, CAROL GARDNER, GERALD SWANTON, VINCENT COLUCCI,

Defendants-Appellants.

No. 80-1261

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARA,
Clerk

by Edward J. Guardaro,
Deputy Clerk

APPENDIX C — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Due Process Clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

18 U.S.C. §1961(4):

> "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]"

18 U.S.C. §1962(c):

> "... any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1962(a):

> "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open

market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities or any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer."

18 U.S.C. §1962(b):

"(b) It shall be unalwful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

18 U.S.C. §1962(d):

"The final substantive RICO crime makes it 'unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.' "